Supreme Court, U.S.
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No. 98-279

In The

Supreme Court of the United States

October Term, 1998

DIANE YOUNG, WILLIAM HURSKIN
and CHARLES ANDERSON,

Petitioners,

vs.

LOCKHEED ADVANCED DEVELOPMENT COMPANY, a division of Lockheed Corporation; and LOCKHEED CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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Pursuant to Sup. Ct. R. 29.6, respondents submit the following corporate disclosure statement:

Aditivos Y Minerales Aminsa, S.A.
Aeroplex of Central Europe
Agridyne Technologies, Inc.
Airod Sendirian Berhad
Airport Group Canada, Inc.
Airport Group Int'l GmbH
Airport Group International Holdings, LLC
Airport Group International, Inc.
Airport Group United Kingdom, Ltd.
Alliance Emirates Development Co.
American Stone Company
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Automated Test International Ltd. Partnership
Bahama Rock Limited
Bayou Mining, Inc.
Beijing Huayun Loral Meteorological Radar Systems Co., Ltd.
Bocep Venturers
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Conic Corp.
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Earth Observation Satellite Company
Eco-21 Technologies, L.P.
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GETAC Corp.
Guangzhou Aircraft Maintenance Engineering Co. Ltd.
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Gulf Technology Systems Group

Hellenic Business Development/Investment Co., S.A.
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Kaser Corp.
LAH Limited
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Letlock-Saudi Arabia
Lockheed Advanced Development Co.
Lockheed Aeronautical Systems Co.
Lockheed Aircraft Argentina, S.A.
Lockheed Aircraft International, Ltd.
Lockheed Aircraft Service Company
Lockheed Aircraft Service Company Ontairo
Lockheed Aircraft Services-Overseas
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Lockheed Information Technology Co.
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Lockheed Martin Aerospace Corp.
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Lockheed Martin Int'l Belgian Services Ltd.
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Lockheed Martin Int'l Systems Ltd.
Lockheed Martin IR Imaging Systems, Inc.
Lockheed Martin Librascope Corp.
Lockheed Martin Medical Imaging Systems, Inc.
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Lockheed Martin Overseas Services Corp.
Lockheed Martin/Rolm Mil-Spec. Corp.
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Lockheed Martin Tactical Systems, Inc.
Lockheed Martin UK Management Services Limited
Lockheed Martin Vought Services, Inc.
Lockheed Martin Vought Systems, Corp.
Lockheed of Turkey, Inc.
Longbow LLC
Loral Space & Communications Ltd.
Louisiana Dredging Company
M4 Environmental, L.P.
M4 Environmental Management, Inc.
Martin Marietta Australia Pty. Ltd.
Martin Marietta EO Associates (Europe), Inc.
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Martin Marietta Materials Canada Ltd.
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TI/Martin Javelin Joint Venture
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Tusas Aerospace Industries, Inc.
United Space Alliance, LLC
Western Investor Technology Group, Inc.
Western Investor Technology Group, LP

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Respondents Lockheed Advanced Development Company and Lockheed Corporation ("Lockheed") respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Court of Appeals decision in this case.

STATEMENT OF THE CASE

Jurisdiction. The jurisdiction of the district court was invoked under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 and 28 U.S.C. § 1367 (supplemental jurisdiction).

This action. This case arises out of the petitioners' loss of "access" — a term of art in the defense industry — to certain classified military programs. None of the petitioners allege they lost their jobs because of their loss of access.

Petitioners' employment. Since 1980, petitioners have been employed by Lockheed as plant protection officers.[1] Plant protection officers are security guards. They control movement in and out of Lockheed's facilities and secure the buildings and designated work areas within the facilities.[2] Many of those buildings house classified and restricted government programs, such as the United States Air Forces' F-117 stealth fighter.

Government security clearances and accesses. Plant protection officers, like all Lockheed employees who work on classified government programs, are required to hold a

1. Transcript of deposition of Charles Anderson taken March 28, 1996 ("Anderson Tr."), 10:6-8 (R.10); Transcript of deposition of William Hurskin dated May 3, 1996 ("Hurskin Tr."), 19:22-20:14 (R.10); Transcript of deposition of Diane Young taken October 31, 1995 ("Young Tr."), 11:23-24; 13:3-10 (R.10).

2. Hurskin Tr., 23:17-25:20 (R.10).

government security clearance.[3] Clearances are granted by the Industrial Security Clearance Office of the United States Department of Defense and fall into the categories of confidential, secret and top secret.[4]

In addition to a government "clearance," military defense workers, including plant protection officers, must also obtain "access"[5] to certain programs, generally the nation's most secret military programs, known as "special access" programs. Special access programs have restrictions and controls beyond those required for "secret" or "top secret" clearances.[6] Some of the special access programs are so sensitive that they are not identified by name, but instead are known only by a letter, such as the "Y" program.[7]

Decisions to grant or deny access are made by the defense contractor's "customer" — usually a branch of the United States Armed Forces, such as the Air Force or the Navy.[8] The *customer*, not the defense contractor, determines what the criteria for access will be, how many will have access and who will have access.[9] If the customer denies an employee access,

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3. Declaration of Kenneth A.U. Hassen dated June 28, 1996 ("Hassen Decl."), ¶ 4 (R.10).

4. *Id.*

5. Hassen Decl., ¶ 5 (R.10).

6. Hassen Decl., ¶ 6 (R.10).

7. Hassen Decl., ¶ 8 (R.10).

8. Hassen Decl., ¶ 11 (R.10).

9. Hassen Decl., ¶¶ 11 and 13 (R.10).

it will inform Lockheed of the decision, but not the basis for the decision.[10] Lockheed is legally and contractually bound to follow the customer's decision to deny an employee access.[11]

Access criteria. A security clearance is a prerequisite for, but does not guarantee, access to a special access program.[12] Access typically involves closer scrutiny of an individual's background.[13] Employees therefore must disclose background information, including "adverse information." The types of information considered by customers to be adverse, and which may therefore result in the customer denying or revoking an individual's access, include evidence of financial instability (such as bankruptcies, tax liens and wage garnishments), evidence of drug or alcohol abuse, arrest records and any other information that might mean an employee is susceptible to influence.[14] Moreover, the government's discovery that an individual has failed to disclose adverse information may be as detrimental as, or more detrimental than, the adverse information itself.[15]

Petitioner Charles Anderson's accesses. In January 1992, Lockheed received a letter from the United States Air Force advising Lockheed that petitioner Anderson was "no longer eligible for access to any Special Access Programs" and

10. Hassen Decl., ¶ 12 (R.10).

11. Hassen Decl., ¶ 9 (R.10).

12. Hassen Decl., ¶ 14 (R.10).

13. *Id.*

14. Hassen Decl., ¶ 15 (R.10).

15. Hassen Decl., ¶ 16 (R.10).

instructing Lockheed to immediately revoke petitioner Anderson's access to all such programs.[16] Pursuant to this directive, Lockheed performed the administrative task of removing from petitioner Anderson's identification badge the indicators necessary for access to special program areas. Consistent with its practice, the government did not inform Lockheed of the reason for its decision to revoke petitioner Anderson's accesses.[17] However, it is undisputed that there was "adverse information" that would have justified the government's decision to revoke petitioner Anderson's access. During pre-trial discovery, petitioner Anderson admitted that he had filed for bankruptcy, had been arrested for kidnaping, had been audited by the Internal Revenue Service and found to owe back taxes and that he had debts that were turned over to collection agencies.[18] Petitioner Anderson also admitted that he had been interviewed by a government investigator about a number of these issues in 1991, at which time he executed a declaration admitting that his monthly expenses exceed his monthly income.[19]

Petitioner William Hurskin's accesses. In November 1992, Lockheed received a letter from the United States Air Force stating that petitioner Hurskin "does not meet the criteria for access to any Special Access Program" and instructing Lockheed to revoke petitioner Hurskin's access to all such programs.[20] As with petitioner Anderson, the government did

16. Hassen Decl., ¶ 12 and Exhibit D thereto (R.10).

17. *Id.*

18. Anderson Tr., 124:10-130:22 (R.10).

19. Anderson Tr., 180:13-184:9 (R.10).

20. Hassen Decl., ¶ 12 and Exhibit E thereto (R.10).

not advise Lockheed of the reason for its decision to revoke petitioner Hurskin's accesses.[21] Like petitioner Anderson, petitioner Hurskin also admitted at his deposition to "adverse information." Eight months before his access was revoked he had been arrested for drunk driving. Petitioner Hurskin further admitted that he did not immediately report this arrest to the government security unit, but rather waited until after he had pleaded guilty to the lesser charge of reckless driving to do so.[22] In addition, petitioner Hurskin advised government investigators that he was having difficulty meeting his financial obligations[23] and it is undisputed that he had previously filed for bankruptcy and had his wages garnished.[24]

Petitioner Diane Young's accesses. In December 1993, petitioner Young was terminated from Lockheed's payroll for violation of the company's attendance policy.[25] Before her termination, petitioner Young had access to four programs identified only by the letters "N," "Y," "V" and "K."[26] Pursuant to government regulations, when employees are terminated from the payroll, the employees are "debriefed" and their accesses are withdrawn.[27] That is what happened to petitioner Young.[28] Petitioner Young subsequently filed a grievance

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21. *Id.*

22. Hurskin Tr., 191:1-193:23 (R.10).

23. Hurskin Tr., 196:9-197:17 (R.10).

24. Consolidated Statement of Uncontroverted Facts and Conclusions of Law, No. 20 (R.17B).

25. Young Tr., 16:5-12; 22:4-21 (R.10).

26. Young Tr., 22:22-23:1 (R.10).

27. Hassen Decl., ¶ 17 (R.10); Young Tr., 21:4-11 (R.10).

28. Hassen Decl., ¶ 17 (R.10); Young Tr. 22:22-23:7 (R.10).

regarding her termination pursuant to provisions of the Collective Bargaining Agreement between Lockheed and the union representing plant protection officers. The settlement of that grievance resulted in petitioner Young's employment being reinstated in February 1994.[29]

Upon her return to work, petitioner Young was submitted for, and granted access to the Y and the N programs.[30] She was not submitted for access to the V program because, at that time, the government had imposed a limit on the number of plant protection officers who could be given access to the V program.[31] Pursuant to the terms of the Collective Bargaining Agreement, petitioner Young was not eligible to be submitted for access to the V program.[32]

Petitioner Young's department manager requested that she be submitted for access to the K program.[33] To receive access to a program, an employee must first complete security questionnaires disclosing any adverse information (*e.g.*, bankruptcies, wage garnishments, arrests, drug abuse) for consideration by the customer.[34] At the time of the hearing on Lockheed's motion for summary judgment, Lockheed's K

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29. Young Tr. 16:5-17:10 (R.10).

30. Young Tr., 54:5-9; 55:3-15 (R.10).

31. Declaration of Gene Souza dated June 27, 1996, ¶ 5 (R.10); Declaration of Abby Rothman dated June 28, 1996 ("Rothman Decl."), ¶ 4 (R.10).

32. Rothman Decl., ¶¶ 9-10 (R.10).

33. Rothman Decl., ¶ 4 (R.10).

34. Hassen Decl., ¶ 10 (R.10).

program security office had not yet received from petitioner Young all the paperwork necessary in order for her to be considered for access to the K program.[35]

Lockheed's motion for summary judgment. On July 1, 1996, Lockheed moved for summary judgment on the grounds that: (i) Lockheed had legitimate, non-discriminatory reasons for the withdrawal of petitioners' accesses and petitioners had no evidence that Lockheed's stated reasons were a pretext for race discrimination; (ii) petitioners Hurskin and Anderson failed to exhaust their administrative remedies under the California Fair Employment and Housing Act ("FEHA"); and (iii) petitioners' causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing are preempted by § 301 of the Labor Management Relations Act ("LMRA").

District Court opinion. On September 9, 1996, the district court granted Lockheed's motion for summary judgment because petitioners did not, and could not, show any connection between the loss of their accesses and any alleged racial discrimination. In granting Lockheed's motion for summary judgment, the district court stated:

> The trouble is that you [petitioners] can't make the connection between the work environment and the actions taken, and you haven't. I don't think you can sustain a cause of action for what you have proven.[36]

Court of Appeals opinion. Petitioners appealed the judgment and the Court of Appeals, in an unpublished opinion,

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35. Declaration of Gary De Boise dated June 28, 1996, ¶¶ 9-11 (R.10).

36. Transcript of Proceedings at 3b, Appendix B to the Petition.

affirmed. The Court of Appeals held that: (i) petitioner Anderson's cause of action for discrimination on the basis of race in violation of the FEHA fails as a matter of law because he failed to exhaust his administrative remedies; (ii) petitioners Young and Hurskin's causes of action for discrimination on the basis of race in violation of the FEHA fail as a matter of law because they failed to present evidence sufficient to raise a triable issue of fact that Lockheed's stated reasons were pretextual; and (iii) petitioners' causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing fail as a matter of law because they are preempted by the LMRA.[37]

SUMMARY OF ARGUMENT

Petitioners argue that the Court of Appeals erred because the state of the law in the Ninth Circuit requires that a court automatically deny summary judgment for the employer where the plaintiff has made a *prima facie* showing of discrimination. According to petitioners, a *prima facie* case always creates a triable issue of fact. Petitioners' entire argument rests upon a 1985 Ninth Circuit case. That opinion, however, was subsequently amended to add clarifying language obviating petitioners' argument. Consequently, neither the case petitioners rely on, nor any other Ninth Circuit opinion, nor any opinion in any other circuit, nor this Court has adopted the rule that a *prima facie* case is, by itself, a sufficient showing to defeat summary judgment when, as here, the employer has advanced a legitimate, non-discriminatory reason for the discharge and there is no evidence that the reason is pretextual.

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37. United States Court of Appeals Opinion dated April 8, 1998 ("Opinion"), Appendix A to the Petition.

Petitioners' second argument is that the appellate court erroneously held that an employer's Human Resources policies cannot form the basis of a valid employment contract where the employer reserves the right to unilaterally modify the terms of the policies. Petitioners, however, have created this "issue" by taking one sentence of the appellate court's decision out of context. Petitioners here are union members subject to a Collective Bargaining Agreement. The court below correctly held that petitioners' contract claims are therefore preempted by the LMRA and petitioners could not rely on Human Resources policies to create a different employment contract.

Finally, petitioners argue that the appellate court erred when it held that petitioner Anderson's uncorroborated declaration was not sufficient to raise a genuine issue of fact as to the date he filed a charge of discrimination. The issue below, however, was not when plaintiff filed his charge, but whether he had exhausted his administrative remedies. Under California state law, a plaintiff must obtain a right to sue letter before filing suit for violation of the state anti-discrimination statutes. That letter is a jurisdictional prerequisite and it is undisputed that petitioner Anderson did not obtain one. The issue petitioners have raised — when petitioner Anderson filed the original charge — has nothing to do with the ultimate outcome of the case.

Because petitioners have failed to raise an issue warranting this Court's review, the petition for writ of certiorari should be denied.

REASONS FOR DENYING THE WRIT

I.

NEITHER THE NINTH CIRCUIT — NOR ANY OTHER CIRCUIT — HAS HELD THAT A PRIMA FACIE SHOWING IS SUFFICIENT TO DEFEAT SUMMARY JUDGMENT.

Petitioners' first Question Presented is whether pursuant to the FEHA:

> An employee who has established a *prima facie* case of employment discrimination by means of actual evidence of racial animus by the decision maker has necessarily created an issue of fact as to whether the employer's proffered reasons for its conduct are pretextual.[38]

Petitioners have failed to raise an issue warranting Supreme Court review. "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons."[39] No such compelling reasons are present here.[40]

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38. Petition at 7.

39. *Sup. Ct. R.* 10.

40. Petitioners actually misrepresent the record and the appellate court decision in framing this issue. Petitioners assert that the appellate court concluded that petitioners established a *prima facie* case with "actual evidence" of discriminatory motive or intent by the "decision-maker." *See e.g.*, Petition at 8, 10. However, petitioners produced no such evidence below and the appellate court made no such ruling. The appellate court merely concluded that the evidence presented by petitioners Young and Hurskin raised an "inference" of discrimination. Opinion at 4a, Appendix A to the Petition.

A. Petitioners Do Not Raise A Conflict Within The Ninth Circuit

Petitioners claim that the Court of Appeals erred by failing to find that petitioners had created a triable issue of fact by establishing a *prima facie* case of discrimination.[41] Petitioners rely entirely on a 1985 Ninth Circuit opinion — *Lowe v. City of Monrovia*, 775 F.2d 998 (CA9 1985) — which stated that, once a plaintiff establishes a *prima facie* case, summary judgment for the defendant "will *ordinarily* not be appropriate." 775 F.2d at 1009 (emphasis added). That opinion, however, was subsequently amended. That amendment added clarifying language which obviates petitioners' argument. Moreover, neither this Court nor the Ninth Circuit nor any other United States Court of Appeals has adopted petitioners' interpretation of the summary judgment standard set forth in *Lowe*. Thus, petitioners have raised an issue that does not constitute a conflict within the Circuit — let alone a conflict among the Circuits. Accordingly, the issue does not warrant Supreme Court review.[42]

1. *Petitioners have not cited the amended Lowe opinion*

In state law discrimination cases, California courts apply the federal analytical model developed under Title VII. *Levy v. Regents of University of California*, 199 Cal. App. 3d 1334, 1343, 245 Cal. Rptr. 576, 581, *cert. denied*, 488 U.S. 893

41. Petition at 10.

42. While the Supreme Court may grant certiorari to review a conflict between the Courts of Appeals on an "important matter" (*see Sup. Ct. R.* 10(a)), a conflict between different panels within the same Court of Appeals ordinarily does not warrant Supreme Court review (*Wisniewski v. United States*, 353 U.S. 901, 902 (1957) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties")).

(1988). The ultimate burden of proof and persuasion in employment discrimination suits is placed squarely on the plaintiffs. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *Mixon v. Fair Employment and Housing Commission*, 192 Cal. App. 3d 1306, 1319, 237 Cal. Rptr. 884, 891 (1987).

Under this framework, the plaintiffs must first prove a *prima facie* case of wrongful discrimination. *Gonzales v. MetPath, Inc.*, 214 Cal. App. 3d 422, 426, 262 Cal. Rptr. 654, 657 (1989); *Levy*, 199 Cal. App. 3d at 1343, 245 Cal. Rptr. at 581. If they do so, the burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employer's decision. *Mixon*, 192 Cal. App. 3d at 1319, 237 Cal. Rptr. at 891. Once the employer produces such evidence, any inference of discrimination drops from the case. *Burdine*, 450 U.S. at 255-56; *Levy*, 199 Cal. App. 3d at 1344, 245 Cal. Rptr. at 581. The plaintiffs must then prove that the proffered justification is not the true reason for the employment decision, but is a mere pretext for actual discrimination. *Id.*

Petitioners ignore this well-established standard. Instead, petitioners contend that a plaintiff always creates a triable issue of fact simply by establishing a *prima facie* case, even when the employer has articulated a legitimate, non-discriminatory reason for the adverse employment action that is not pretextual. Petitioners arrive at their position by overstating *Lowe*. Although petitioners quote the *Lowe* opinion at length,[43] they fail to include the following clarifying language subsequently amending the opinion:

> The principles described above do not prevent the summary disposition of meritless suits but simply

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43. Petition at 11.

> ensure that when a genuine issue of material fact exists a civil rights litigant will not be denied a trial on the merits.

Lowe v. City of Monrovia, 784 F.2d 1407, 1407 (CA9 1986), *amending* 775 F.2d 998. In filing the instant petition, petitioners have failed to heed Judge Reinhardt's instruction.

The absurdity of petitioners' contention is demonstrated by the facts of this case. Petitioners claim that they were discriminated against on the basis of their race because their security "accesses" were revoked. The Court may assume that petitioners could satisfy the minimal requirements of a *prima facie* case: petitioners are black, their accesses were revoked and non-black employees did not have their accesses revoked as well. Under petitioners' logic, even if it is undisputed that the government — not the employer — decided to revoke the accesses, *i.e.*, the employer had legitimate, non-discriminatory reasons for the adverse action, the case must still go to a jury even though petitioners had no evidence that the legitimate, non-discriminatory reasons were pretextual. This is exactly the scenario Judge Reinhardt warned against: a meritless case would go to trial.

2. *The Ninth Circuit has not adopted petitioners' interpretation of Lowe*

That petitioners' interpretation of *Lowe* is not correct is further demonstrated by subsequent Ninth Circuit decisions. Those cases granted summary judgment, despite the plaintiffs' *prima facie* showing. Indeed, at least two opinions explicitly rejected the argument advanced by petitioners here: that summary judgment is never appropriate if a plaintiff can establish a *prima facie* case. In *Federal Deposit Ins. Corp. v. Henderson*, 940 F.2d 465, 473 n.16 (CA9 1991), the Court noted

that *Lowe* was subsequently amended to include language clarifying its holding. In *Henderson*, the court upheld summary judgment for the employer on the grounds that the plaintiff's direct evidence of discriminatory intent was not sufficient to raise a genuine issue of fact as to the employer's motive. According to *Henderson*, the appropriate standard is whether "there exists a genuine issue as to whether [the defendant] purposefully discriminated against [the plaintiff] on the basis of race." *Id.*

In *Wallis v. J.R. Simplot Co.*, 26 F.3d 885 (CA9 1994), a Title VII and Age Discrimination in Employment Act case, the appellant relied on *Sischo-Nownejad v. Merced Community College Dist.*, 934 F.2d 1104 (CA9 1991), for the proposition that summary judgment for the employer is never appropriate where the plaintiff has established a *prima facie* case. *Wallis*, 26 F.3d at 889. The appellant argued that *Sischo-Nownejad*, which relied on *Lowe*, held that a plaintiff's *prima facie* showing is sufficient to defeat summary judgment.[44]

The *Wallis* court rejected the appellant's argument and affirmed summary judgment for the employer, holding that a plaintiff cannot defeat summary judgment by merely establishing a *prima facie* case. The court specifically held that, in response to the employer's offer of legitimate, non-discriminatory reasons for the adverse action, a plaintiff must produce " 'specific, substantial evidence of pretext' " to survive summary judgment. 26 F.3d at 890 (*citing Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (CA9 1983)). The court stated:

> [Plaintiff's] assertion, that once a plaintiff makes out a *prima facie* case summary judgment is impermissible, is untenable. His position would

44. Notably Judge Reinhardt, the author of the *Lowe* opinion, penned the *Sischo-Nownejad* decision as well.

> require a trial in every discrimination case, even where no genuine issue of material fact exists concerning the legitimacy of the employer's nondiscriminatory reasons. Such a result is not compelled by *Sischo-Nownejad* and would be contrary to other cases affirming summary judgment where the plaintiff failed to produce evidence of intentional discrimination.

Wallis, 26 F.3d at 890. The court held that *Sischo-Nownejad* actually stands for the proposition that when the Court ultimately determines whether the plaintiff has created an issue of fact regarding the credibility of the employer's stated non-discriminatory reasons for the adverse action, the court must look at *both* the evidence supporting the *prima facie* case and the evidence offered by the plaintiff to rebut the employer's stated reason as pretextual. *Wallis*, 26 F.3d at 890.

Other Ninth Circuit cases have explicitly held that a *prima facie* case, by itself, does not automatically create a triable issue of fact. *See Bradley v. Harcourt, Brace & Co.*, 104 F.3d 267, 271 (CA9 1996) (upholding summary judgment for employer because plaintiff did not produce any evidence showing employer's stated reasons were pretextual); *Lindahl v. Air France*, 930 F.2d 1434, 1437 (CA9 1991) (holding "a plaintiff cannot defeat summary judgment simply by making out a *prima facie* case"); *DeHorney v. Bank of America Nat'l Trust & Sav. Ass'n*, 879 F.2d 459, 468 (CA9 1989) (upholding summary judgment for employer because plaintiff failed to establish nexus between alleged racial slur and decision to terminate); *Sorosky v. Burroughs Corp.*, 826 F.2d 794, 804 (CA9 1987) (upholding summary judgment for employer because plaintiff "failed to produce sufficiently probative evidence of pretext"); *Cotton v. City of Alameda*, 812 F.2d 1245, 1250 (CA9 1987) (upholding summary judgment for employer because plaintiff

did not produce direct evidence that employer's stated reasons were pretextual); *Schuler v. Chronicle Broadcasting Co.*, 793 F.2d 1010, 1011 (CA9 1986) ("To withstand an employer's motion for summary judgment in a discrimination suit, the employee must do more that establish a prima facie case and deny the credibility of the employer's witnesses. [Cites omitted] The plaintiff must also offer specific and significantly probative evidence that the employer's alleged purpose is a pretext for discrimination.").

B. Petitioners Do Not Raise A Conflict Among The Circuits

The United States Courts of Appeals, including the Ninth Circuit, are in agreement that a plaintiff in an employment discrimination case cannot defeat summary judgment, once the employer has articulated a legitimate, non-discriminatory reason for the adverse employment action, merely by establishing a *prima facie* case. *LeBlanc v. Great Am. Ins. Co.*, 6 F.3d 836, 834 (CA1 1993) (to survive summary judgment plaintiff must show evidence sufficient for fact finder reasonably to conclude discriminatory motive), *cert. denied*, 511 U.S. 1018 (1994); *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 141 (CA2 1993) (plaintiff must show employer's stated reason is false and show real reason is discriminatory to establish pretext), *cert. denied*, 510 U.S. 1164 (1994); *Geary v. Visitation of the Blessed Virgin Mary*, 7 F.3d 324, 332 (CA3 1993) (plaintiff did not survive summary judgment because she did not present evidence showing genuine issue of fact as to employer's stated reason for discharge); *Mitchell v. Data Gen. Corp.*, 12 F.3d 1310, 1316 (CA4 1993) (defendant can obtain summary judgment by presenting evidence of legitimate, non-discriminatory reason about which plaintiff does not create factual dispute); *Davis v. Chevron U.S.A.*, 14 F.3d 1082, 1087 (CA5 1994) (plaintiff does not automatically defeat summary judgment by making out *prima facie* case but must also prove

pretext); *Gagne v. Northwestern Nat'l Ins. Co.*, 881 F.2d 309, 314 (CA6 1989) (plaintiff established *prima facie* case but could not survive summary judgment because she did not introduce evidence that she was terminated because of her age); *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1124 (CA7 1994) (to survive summary judgment plaintiff must "produce evidence from which a rational factfinder could infer that the company lied" about its stated reasons); *Gaworski v. ITT Commercial Fin. Corp.*, 17 F.3d 1104, 1109 (CA8 1994) (to survive summary judgment plaintiff must produce evidence sufficient for reasonable fact finder to reject employer's stated reason), *cert. denied*, 513 U.S. 946 (1994); *Durham v. Xerox Corp.*, 18 F.3d 836, 840 (CA10 1994) (plaintiff could not survive summary judgment without proof of pretext or direct evidence of discriminatory intent), *cert. denied*, 513 U.S. 819 (1994); *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1287-88 (CA11 1997) (plaintiff could not survive summary judgment because she did not rebut employer's stated reason as pretextual).

C. Petitioners Do Not Raise A Conflict With This Court

Since Judge Reinhardt's opinions in *Lowe* and *Sischo-Nownejad*, this Court has addressed the issue of a plaintiff's burden of proof. In *St. Mary's Honor Center v. Hicks*, this Court granted certiorari where the Eighth Circuit reversed summary judgment for the employer on the grounds that once the plaintiff proved all of the employer's stated reasons were pretextual, the plaintiff was entitled to judgment as a matter of law. This Court reversed the Eighth Circuit and held that the plaintiff ultimately bears the burden of not only refuting the employer's stated reason as pretextual, but also establishing by a preponderance of the evidence that the employer intentionally discriminated against the plaintiff. 509 U.S. at 519. In so doing, this Court reaffirmed the analytical model developed under Title

VII. This Court stated that once the employer articulates a legitimate, non-discriminatory reason for the adverse employment action, the presumption of discrimination created by the plaintiff's establishment of a *prima facie* case "simply drops out of the picture." 509 U.S. at 510-11. It logically follows from *Hicks* therefore that, once the employer articulates a legitimate, non-discriminatory reason for the adverse employment action, the plaintiff cannot defeat summary judgment by relying on her *prima facie* case alone. *See also*, *Burdine*, 450 U.S. 248; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Petitioners have identified no conflict within the Ninth Circuit nor among the United States Courts of Appeals nor with this Court. Indeed, the issue presented by petitioners ignores an entire body of case law developed by this Court, as well as the lower courts in the federal and state judicial systems, establishing the analytical model of burdens of proof and production in employment discrimination cases. Accordingly, petitioners' first Question Presented fails to raise an issue warranting Supreme Court review.

II.

PETITIONERS' CONTRACT CLAIMS ARE PREEMPTED BY THE LMRA, THUS WHETHER OR NOT AN EMPLOYER'S HUMAN RESOURCES POLICIES MAY FORM THE BASIS OF AN IMPLIED CONTRACT IS IMMATERIAL.

Petitioners' second Question Presented is whether the appellate court erred by holding that, contrary to California law, an employer's Human Resources policies cannot form the basis of a valid employment contract where the employer reserves the right to unilaterally modify the terms of the

policies.[45] Petitioners, however, take one sentence of the appellate court's decision out of context and thereby have missed the point entirely. Petitioners are union members subject to a Collective Bargaining Agreement. The issue for the court below was *not* the general question of whether an implied contract may be based upon an employer's Human Resources policies. The specific question was whether a plaintiff can maintain a state-law cause of action for breach of contract and breach of the implied covenant of good faith and fair dealing where, as here, a collective bargaining agreement governed the employment relationship.

The appellate court's response to this question was correct. The appellate court held that petitioners' employment relationship with Lockheed is governed by a Collective Bargaining Agreement and petitioners' breach of contract and breach of the implied covenant claims are therefore preempted by the LMRA.[46] *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985) ("questions relating to what the parties to a labor agreement agreed . . . must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort. Any other result would elevate form over substance and allow parties to evade the requirements of § 301 by relabeling their contact claims as tortious breach of contract."); *accord*, *Chmiel v. Beverly Wilshire Hotel Co.*, 873 F.2d 1283, 1285-1286 (CA9 1989) (claims for breach of implied contract and implied covenant are preempted under section 301); *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857 (CA9 1987), *cert. denied*,

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45. Petition at 13.

46. Opinion at 6a, Appendix A to the Petition. Any additional comments made by the appellate court concerning petitioners' attempt to establish an implied in fact contract based on Lockheed's Human Resources policies are immaterial.

486 U.S. 1054 (1988) ("[t]he preemptive force of section 301 is so powerful as to displace entirely any state cause of action for violation of a collective bargaining agreement.") (*relying on Franchise Tax Bd. v. Laborers Vacation Trust*, 463 U.S. 1, 23 (1983)). As a matter of federal law, petitioners could not bring individual contract claims because they belong to a union which has a Collective Bargaining Agreement. Petitioners have cited no authority to the contrary.

Although petitioners do not dispute that their employment is governed by a Collective Bargaining Agreement, they argue that their contract claims are not preempted because their contracts are separate from the Collective Bargaining Agreement. However, no concurrent implied contract can exist where there is already an express contract — the Collective Bargaining Agreement — on the same subject. *Chmiel*, 873 F.2d at 1285-1286 (holding plaintiff's breach of contract claim based on express or implied agreement outside the collective bargaining agreement preempted because independent contract claim concerned job position governed by collective bargaining agreement); *Young v. Anthony's Fish Grottos, Inc.*, 830 F.2d 993, 1000 (CA9 1987) (holding implied covenant claim preempted because it is " 'inextricably intertwined with consideration of the terms of the labor contract' ").

This is consistent with other Supreme Court authority. When addressing disputes between employees and employers regarding the scope and breadth of collective bargaining agreements, this Court has enunciated general principles applicable here. In *Republic Steel Corporation v. Maddox*, 379 U.S. 650 (1965), this Court stated:

> A contrary rule which would permit an individual to completely sidestep available grievance procedures [under the collective bargaining

> agreement] in favor of a lawsuit has little to commend it. . . . [I]t would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances.

Maddox, 379 U.S. at 653. In *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), this Court provided:

> The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. [Cites omitted] *The collective bargaining agreement covers the whole employment relationship.*

United Steelworkers, 363 U.S. at 578-79 (emphasis added). These general principles have guided lower courts in deciding that no concurrent implied contract can exist where there is already an express contract — a collective bargaining agreement — on the same subject.

Accordingly, the appellate court correctly ruled that petitioners' breach of contract and breach of the implied covenant claims are preempted by § 301 of the LMRA. Petitioners' misstatement of the appellate court's decision does not change that fact nor create an issue for this Court's review.

III.

THE ISSUE IS NOT WHETHER PETITIONER ANDERSON COMMENCED HIS ADMINISTRATIVE PROCEEDINGS BUT WHETHER HE EXHAUSTED THEM.

Petitioners' third and final Question Presented is whether the appellate court erred when it rejected petitioner Anderson's FEHA cause of action on the basis that his uncorroborated declaration was not sufficient to raise a genuine issue of fact regarding whether or not he had timely filed a charge of discrimination with the California Department of Fair Employment and Housing ("DFEH").[47] Once again, petitioners have failed to see the forest for the trees.

Under California law, to maintain a civil action for damages under the FEHA, a plaintiff must, as a precondition to the suit, exhaust the administrative remedies established thereunder. *See Commodore Home Systems, Inc. v. Superior Court*, 32 Cal. 3d 211, 213-14, 185 Cal. Rptr. 270, 271 (1982); *Denney v. Universal City Studios Inc.*, 10 Cal. App. 4th 1226, 1232, 13 Cal. Rptr. 2d 170, 173 (1992). To exhaust administrative remedies, a plaintiff must obtain a right to sue letter. *See Commodore*, 32 Cal. 3d at 213-14, 185 Cal. Rptr. at 271. A plaintiff who fails to exhaust administrative remedies *prior to* filing suit cannot maintain a civil action alleging violation of the FEHA. *See Miller v. United Airlines, Inc.*, 174 Cal. App. 3d 878, 890-91, 220 Cal. Rptr. 684, 691-92 (1985) (plaintiff failed to exhaust her administrative remedies where she obtained right to sue letter *after* filing suit). Failure to exhaust administrative remedies is a jurisdictional, not a procedural, defect. *Miller*, 174 Cal. App. 3d at 890, 220 Cal. Rptr. at 691. Therefore, if a plaintiff fails to do so, the trial court must grant summary judgment and dismiss the suit. *Id.*

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47. Petition at 14-15.

It is undisputed that petitioner Anderson did not obtain a right to sue letter before filing the instant action.[48] Accordingly, petitioner Anderson did not exhaust his administrative remedies and his cause of action for discrimination on the basis of race in violation of the FEHA fails as a matter of law. *See Grywczynski v. Shasta Beverages, Inc.*, 606 F. Supp. 61, 65 (N.D. Cal. 1984) ("Compliance with the administrative procedures set forth in the statute is a prerequisite for any private civil suit for age discrimination under California law.").

Petitioner Anderson is quibbling about the immaterial issue of whether he *filed a charge* of discrimination with the DFEH. That issue is not dispositive. The first step in the administrative process under the FEHA is the timely filing of a charge of discrimination with the DFEH. *See Cal. Gov't Code* § 12960. The filing of this charge, commences administrative remedies; it does not exhaust them. The dispositive issue is whether petitioner Anderson received a right to sue letter. That letter is a jurisdictional prerequisite and it is undisputed that petitioner Anderson did not obtain one. Thus, the appellate court did not have to decide the issue petitioners present here. Because petitioners have raised an immaterial issue that had no affect on the ultimate outcome of the case, the petition for Supreme Court review should be denied. *See SS Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) (dismissing writ of certiorari where question presented considered academic, stating "[w]hile this Court decides questions of public importance, it decides them in the context of meaningful litigation.").

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48. Petitioner Anderson did attempt to save his claim by obtaining a right to sue letter after Lockheed had already moved for summary judgment. This belated attempt to comply with the requirements of *Cal. Gov't Code* § 12960 is ineffective. Because he did not exhaust his administrative remedies before filing suit, petitioner Anderson cannot maintain the instant action. *See Miller*, 174 Cal. App. 3d at 891, 220 Cal. Rptr. at 692.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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